UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

CLIFFORD W. MILLER, Plaintiff, v. ROMEO ARANAS, *et al.*, Defendants.	Case No. 3:17-cv-00068-MMD-WGC ORDER

I. SUMMARY

Plaintiff Clifford Miller, currently incarcerated and in the custody of the Nevada Department of Corrections ("NDOC"), brings claims against Defendants the NDOC for violations of Title II of the Americans with Disability Act ("ADA") and Dr. Romeo Aranas under 42 U.S.C. § 1983 for violations of Plaintiff's Eighth Amendment rights. (ECF No. 71 ("TAC").) Before the Court are two Reports and Recommendations (ECF Nos. 99, 100 ("R&Rs")) of United States Magistrate Judge William G. Cobb. The R&Rs recommend the Court deny Plaintiff's partial summary judgment motions (ECF Nos. 75, 76 ("Motions")). Plaintiff timely filed his objections (ECF Nos. 101, 103 ("Objections")) to the R&Rs.[1] Because the Court agrees with Judge Cobb and as further explained below, the Court overrules Plaintiff's Objections and will adopt the R&Rs in full.

II. BACKGROUND

The Court incorporates by reference Judge Cobb's recitation of the factual background provided in the R&Rs, which the Court adopts here. (ECF Nos. 99 at 2-4, 7-12; 100 at 2-3, 6-14.)

[1]Defendants filed corresponding responses (ECF Nos. 106, 108) to the Objections.

III. LEGAL STANDARD

A. Review of the Magistrate Judge's Recommendations

This Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party timely objects to a magistrate judge's report and recommendation, then the Court is required to "make a de novo determination of those portions of the [report and recommendation] to which objection is made." *Id.* Because of Plaintiff's Objections to the R&Rs, the Court has undertaken a *de novo* review.

B. Summary Judgment

"The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court." *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits "show there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving party and a dispute is "material" if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Where reasonable minds could differ on the material facts at issue, however, summary judgment is not appropriate. *See id.* at 250-51. "The amount of evidence necessary to raise a genuine issue of material fact is enough 'to require a jury or judge to resolve the parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all inferences in the light most favorable to the nonmoving party. *See Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986) (citation omitted).

The moving party bears the burden of showing that there are no genuine issues of material fact. *See Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once

the moving party satisfies Rule 56's requirements, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient[.]" *Anderson*, 477 U.S. at 252.

IV. DISCUSSION

Following a *de novo* review of the R&Rs, relevant briefs, and other records in this case, the Court finds good cause to accept and adopt Judge Cobb's R&Rs. The Court will first address Plaintiff's Eighth Amendment deliberate indifference arguments, then will turn to his ADA discrimination and retaliation claims.

A. Eighth Amendment Deliberate Indifference

Judge Cobb recommends that Plaintiff's motion for partial summary judgment (ECF No. 76) be denied as there remains a genuine dispute of material fact of whether Defendant Dr. Romeo Aranas was deliberately indifferent to Plaintiff's serious medical needs in violation of the Eighth Amendment. (ECF No. 100 at 20-26.) The primary dispute of fact is whether Plaintiff was denied surgery because of the NDOC's policies, or because it was not medically necessary or urgent. (*Id.* at 23.) There are also disputes as to whether Plaintiff suffered further injury from delayed surgery and whether the NDOC has in effect a "one good eye" policy. (*Id.* at 24-25.) Plaintiff's objection merely reiterates that Dr. Aranas could not have relied on Dr. Seljestad's opinion because Dr. Aranas "rubberstamp[ed] grievance denials," thus evidencing deliberate indifference. (ECF No. 103 at 21-23.) Plaintiff further argues that forcing him to wait 20 years for cataract surgery is "patently unreasonable" in light of his serious medical condition. (*Id.* at 23-24.) While the Court is

sympathetic to Plaintiff's situation, the Court nevertheless agrees with Judge Cobb.

The Eighth Amendment prohibits the imposition of cruel and unusual punishment and "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the Eighth Amendment when he or she acts with "deliberate indifference" to the serious medical needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). "To establish an Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference." *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012).

Here, the dispute between the parties is over the deliberate indifference prong. To satisfy the deliberate indifference prong, a plaintiff must show "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." *Id*. "Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." *Id*. (internal quotations omitted). When an inmate alleges delay of medical treatment evinces deliberate indifference, the inmate must show the delay led to further injury. *See Shapley v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (holding that "mere delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference"). Additionally, "[a] difference of opinion between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a § 1983 claim*." Franklin v. Or., State Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981).

The NDOC's Medical Directive ("MD") 123.03 states in part the following:

> 1. Inmate patients with a cataract that causes visual impairment incompatible with the ability to perform the required tasks of daily living in their current living environment may be considered for removal of such cataract.
> 2. There must be documentation of a best corrected visual acuity of less than 20/60 in both eyes with current (less than 6 months) refraction.

(ECF No. 76-4 at 6.)[2] Judge Cobb prudently noted that MD 123.03 is essentially a "one good eye" policy because an inmate is not eligible for cataract surgery if he or she has a normal (or above 20/60) visual acuity in one eye. (ECF No. 100 at 24-25.) The Ninth Circuit Court of Appeals has previously found a "blanket, categorial denial of medically indicated surgery solely on the basis of an administrative policy that 'one eye is good enough for prison inmates' is the paradigm of deliberate indifference." *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014). But Plaintiff has not presented any concrete evidence that Dr. Aranas excluded him from cataract surgery because of, or "solely" because of, MD 123.03.

But neither is there sufficient evidence in the record, particularly when viewed in the light most favorable to the nonmoving party Dr. Aranas, to conclude with certainty that Dr. Aranas denied surgery to Plaintiff because it was not medically necessary or urgent. On November 10, 2016, Dr. Aranas issued a response denying Plaintiff's second-level grievance requesting treatment. (ECF No. 93-5.) He explicitly stated that he had reviewed Plaintiff's charts, as well as the first-and second-level grievances. (*Id*.) Dr. Aranas's response also indicated that Plaintiff had multiple visits with providers and specialists, Plaintiff's 1999 gunshot injury did not qualify as urgent care or life threatening, and Plaintiff had recently seen an eye specialist who made no mention of surgery. (*Id*.) Dr. Aranas further ordered Plaintiff for a follow-up at the eye clinic in one year. (*Id*.)

At that time, evidence existed that Plaintiff had a cataract in his right eye and removal was recommended with intraocular lens to the right eye. (ECF Nos. 76-6 at 9; 76-4 at 20.) Medical progress notes dated October 4, 2002 mentioned Plaintiff had a severe right lens cataract and recommended consult and cataract surgery. (ECF No. 76-5 at 10.) A letter dated June 2, 2016 from Dr. Fischer stated Plaintiff needed a strabismus surgery to correct the problem with his right eye and recommend Dr. Hong for the procedure. (ECF No. 93-6.) There were also medical notes from March 11, 2002 stating Plaintiff was

[2]The Court notes that the copy of MD 123 submitted by Plaintiff was effective March 2019. This version and the language cited may not have been the exact language relevant from the time Plaintiff began the grievance process up until this version of MD 123 became effective.

"[a]dvised that probably nothing can be done"[3] regarding the damaged right eye. (ECF No. 76-4 at 22.) Conversely, a February 25, 2016 report by Dr. Seljestad, an optometrist, appears to state that Plaintiff's traumatic cataract and second gunshot wound to the eye was "stable." (ECF No. 93-1.) Plaintiff disclosed via an informal grievance in March 2016 that Dr. Seljestad told Plaintiff that he would never see out of his eye again. (*See* ECF No. 93-2 at 4.)

Nearly three years after Dr. Aranas's November 10, 2016 grievance response denying Plaintiff's treatment request and more than three years after Dr. Fischer's June 2, 2016 recommendation, Plaintiff eventually saw Dr. Hong on September 25, 2019. (ECF No. 93-7.) A fax from Dr. Hong dated October 28, 2019 stated: "Cataracts in both eyes, right worse than left. *Not* urgent; elective surgery." (ECF No. 93-8 at 2 (emphasis in original).) In the end, Plaintiff received cataract surgery on June 30, 2020, which was unsuccessful in restoring Plaintiff's vision. (ECF No. 93-9 at 7.)

Based on the evidence provided, there is a dispute as to whether Plaintiff's surgery was medically necessary or urgent. Whether the 20 years that Plaintiff had to wait for his surgery was "patently unreasonable" in light of his serious medical condition depends in part on resolving that dispute. It is worth mentioning that Dr. Aranas—the sole Defendant in this claim—became the NDOC's medical director in 2013. Nevertheless, it is evident that several years have passed from the time Plaintiff sought eye surgery to when he ultimately received it. Because a dispute remains, the Court cannot find that Dr. Aranas was deliberately indifference because Plaintiff waited "20 years" for surgery. A rational trier of fact could reasonably find that Dr. Aranas did not act with deliberate indifference.

As to Plaintiff's argument that Dr. Aranas was deliberately indifferent because he "merely signs 'prepared responses' by 'grievance responders'" (ECF No. 103 at 21 (citing Dr. Aranas's interrogatory responses at ECF No. 76-3 at 10)) to conclude that he did not

[3]The Court notes that it is unclear, given the nature of this case, whether "probably nothing can be done" is because it is medically impossible to correct the damaged eye or because of specific policies and procedures present an impossibility for Plaintiff to receive surgery to correct the damaged eye.

rely on Dr. Seljestad's opinion in denying Plaintiff surgery, the Court does not find Plaintiff's argument convincing. The Court reviewed *de novo* Dr. Aranas's interrogatory responses (ECF No. 76-3), which was cited to infer that Dr. Aranas rubberstamped grievance denials, thereby evidencing deliberate indifference. In the interrogatories, Dr. Aranas was asked to explain if his denial was based on Plaintiff having a self-inflicted gunshot injury. (*Id*. at 10.) Dr. Aranas stated that he "signs the prepared responses by designated grievance responders" and that "the denial had nothing to do with Plaintiff's self-inflicted gunshot injury." (*Id*. (internal quotes omitted).) The Court does not infer from Dr. Arana's response what Plaintiff posits with his argument, which is that Dr. Aranas was deliberately indifferent.

The Court agrees with Judge Cobb that there is a dispute of material fact whether Dr. Aranas's denial of—or his delay in allowing—Plaintiff's requested surgery constitutes "deliberate indifference" to Plaintiff's serious medical needs in light of medical evidence, and whether said delay caused Plaintiff further injury. Plaintiff therefore has not shown he is entitled to summary judgment as there is a genuine issue as to material fact. *See Celotex Corp.*, 477 U.S. at 322. Accordingly, the Court adopts Judge Cobb's recommendation with respect to Plaintiff's Eighth Amendment claim of deliberate indifference and denies Plaintiff's motion for partial summary judgment.

B. ADA Discrimination

Judge Cobb recommends that Plaintiff's motion for partial summary judgment (ECF No. 76) be denied because there is an obvious dispute of material fact regarding the basis for Plaintiff's surgery denial, as explained above, which implicates whether he has an actionable Title II ADA discrimination claim. (ECF No. 100 at 26-35.) Similar to the Court's explanation of Plaintiff's Eighth Amendment deliberate indifference claim, it remains unclear whether Plaintiff was denied surgery due to intentional discrimination of monocular blindness disability—a violation of the ADA—or due to the surgery not medically necessary, urgent, or helpful to Plaintiff. (*Id*. at 33.) Plaintiff objects and argues that he does not need to show he was denied surgery if he was subjected to discrimination, which

includes a failure to reasonably accommodate his disability. (ECF No. 103 at 13.) The Court, however, is not convinced here by Plaintiff's argument.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II includes "an affirmative obligation for public entities to make benefits, services, and programs accessible to people with disabilities." *Updike v. Multnomah Cty.*, 870 F.3d 939, 949 (9th Cir. 2017). "To prove that a public program or service violated Title II of the ADA, a plaintiff must show: (1) he [or she] is a 'qualified individual with a disability' (2) he [or she] was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reasons of his [or her] disability." *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001) (citing *Weinreich v. L.A. Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)). To recover monetary damages, plaintiff must prove intentional discrimination by showing defendant acted with "deliberate indifference." *See id*. at 1138. "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and failure to act upon [] the likelihood." *Id*. at 1139 (citation omitted).

Here, Plaintiff's argument presumes the existence of a discriminatory basis for surgery denial and ignores the key point in Judge Cobb's analysis which is that Plaintiff has not shown that "the denial of surgery was *because of* his disability." (ECF No. 100 at 33 (emphasis added).) It remains arguable that Defendant did not fail to act, but rather determined based on medical evidence that surgery was not medically necessary, urgent, or helpful to Plaintiff. At the summary judgment phase, Plaintiff must show the discrimination—here, failure to reasonably accommodate monocular blindness via surgery—"was by reasons of his disability." *See Duvall*, 260 F.3d at 1135. Plaintiff has not done so and the Court thus agrees with Judge Cobb that Plaintiff is not entitled to summary

judgment as there remains a genuine dispute of material fact. *See Celotex Corp.*, 477 U.S. at 322. Accordingly, Plaintiff's motion for partial summary judgment is denied.

C. ADA Retaliation

Judge Cobb recommends that Plaintiff's motion for partial summary judgment (ECF No. 75) on the ADA retaliation claim be denied and that the claim proceed to a bench trial. (ECF No. 99 at 7-16.) He found that there is a dispute of fact regarding whether Plaintiff was disciplined by the NDOC for exercising Plaintiff's rights or for abuse of the grievance process under the NDOC's Administrative Regulation ("AR") 740. (*Id.* at 14.) Plaintiff objects by arguing that there are no issues of fact in dispute. (ECF No. 101 at 4-5.) More specifically, Plaintiff recites undisputed facts and asserts that the filing of his ADA grievance was the "but-for cause" of the NDOC's disciplinary action against Plaintiff. (*Id.* at 7.) Plaintiff points out that the "NDOC does not deny that had [Plaintiff] not filed an ADA grievance he would not have been disciplined." (*Id.* at 7, n.18, n.19.) The Court, however, finds that Plaintiff has not met his burden of establishing that the NDOC's reasoning for the adverse action was a pretext for ADA discrimination.

The Ninth Circuit Court of Appeals applies the *McDonnell Douglas* burden-shifting standard to analyze ADA retaliation claims asserted based on circumstantial evidence. *See, e.g.*, *T.B. v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015) (applying *McDonnell Douglas* to a motion for summary judgment). Under *McDonnell Douglas Corp. v. Green*, a plaintiff must first establish a prima facie case of retaliation as set forth below. 411 U.S. 792, 802 (1973). If the plaintiff is successful, the burden shifts to the defendant to successfully articulate a legitimate, non-retaliatory reason for their actions, which then shifts back to the plaintiff to show the defendant's reason is a pretext or cover for its true retaliatory motive. *See id. at* 802-05.

A plaintiff bringing an Article II ADA retaliation claim must show "(a) that he or she was engaged in a protected activity, (b) that he or she suffered an adverse action, and (c) that there was a *causal link* between the two." *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir. 2012) (emphasis added) (citing *Brown v. City of Tucson*, 336 F.3d. 1181, 1192

(9th Cir. 2003)); *see also T.B.*, 806 F.3d at 473 (holding that *McDonnell Douglas* standard applies to Article II ADA retaliation claims). The "causal link" between the two consist of a more stringent test of but-for causation. *Id.* (citing *Uni. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013)).

Here, Plaintiff has established a prima facie case of retaliation. Plaintiff engaged in a protective activity by filing a second grievance in an attempt to exhaust his ADA claim. (ECF No. 75-2 at 10-14.) Plaintiff suffered an adverse action when the NDOC disciplined Plaintiff with 15-days loss of canteen privileges for filing the second grievance. (ECF No. 92-9 at 3.) Between the time Plaintiff filed his first grievance in 2016 to his second grievance in 2019, Plaintiff also filed this federal action against the NDOC. (*See* ECF No. 1-1.) The Court finds that there is a causal link between the protective activity and the adverse action. Plaintiff has thus established a prima facie case and the burden shifts to the NDOC to articulate a legitimate reason for the adverse action.

The NDOC denies retaliation and contends the adverse action was proper because Plaintiff was abusing the grievance process by filing a duplicate grievance. (ECF No. 92 at 8-9.) According to the NDOC, Plaintiff violated AR 740.04 because his "second grievance arouse out of the same claim and requested the same remedy." (*Id.* at 8.) This is in violation of section 2.B of AR 740.04, which states that "[s]pecific claims or incidents previous filed by the same inmate" is considered an abuse of the inmate grievance procedure. (*Id.* (citing AR 740.04 2.B.)) Abuse under this administrative regulation results in "the grievance being not accepted and disciplinary action may be taken" by the NDOC.[4] *See* AR 740.04 1. The Court finds that the NDOC has articulated a non-retaliatory reason

[4]The Court notes that AR 740.04 1 states that disciplinary action *may* be taken by the NDOC. The Notice of Disciplinary Charges dated July 22, 2019 states, "[Plaintiff] is an experienced grievance writer who well understands what he is doing by filing duplicate, frivolous grievances. He understands that abusing the grievance process can lead to disciplinary action." (ECF No. 75-3 at 14.) A summary of a July 30, 2019 hearing regarding Plaintiff's alleged violation includes a preliminary statement by Plaintiff that states in part, "This is not a duplicate claim, this is america's [*sic*] disability claim that my perosn [*sic*] that I am requesting as counsel is Terry Keleer Cooper [*sic*] who instructed me to file for my handicap." (ECF No. 92-9 at 5.) Plaintiff was nevertheless found guilty of abuse of the grievance process and given 15 days canteen loss. (*Id*. at 3.)

for its actions, and therefore the burden shifts back to Plaintiff to evidence a pretext or cover for its true retaliatory motive.

Plaintiff argues that, "had [Plaintiff] not filed an ADA grievance he would not have been disciplined," and thus "[t]he ADA grievance was the proximate cause and the cause in fact of [Plaintiff's] protective activity; but for [Plaintiff's] filing of his ADA grievance he would not have been disciplined." (ECF No. 101 at 3.) Moreover, Plaintiff argues that the NDOC's administrative regulations—particularly AR 740—makes the grievance process nearly impossible for inmates and renders Plaintiff "hopelessly doomed whichever way he went." (*Id*. at 17.) While the Court is sympathetic to the "catch-22" situation Plaintiff arguably finds himself, in viewing the facts and drawing all inferences most favorable to the nonmoving party, the Court finds that Plaintiff has not met his burden to show AR 740 is a pretext, or that application of AR 740 to discipline Plaintiff is a pretext, for the NDOC's retaliatory motive. *See McDonnell Douglas*, 411 U.S. at 804 (stating that Plaintiff must show the reason provided by Defendant was pretext for an impermissible reason). The Court therefore agrees with Judge Cobb that Plaintiff's motion for partial summary judgment should be denied with respect to Plaintiff's ADA retaliation claim and will adopt his recommendation. This claim will proceed to a bench trial.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the Motions before the Court.

It is therefore ordered that the Reports and Recommendations of Magistrate Judge William G. Cobb (ECF Nos. 99, 100) are accepted and adopted in full.

It is further ordered that Plaintiff's motions for partial summary judgment (ECF Nos. 75, 76) are denied.

DATED THIS 17th Day of March 2021.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE